

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAN MAJELLA FREEMAN, a/k/a Jan Mejella Freeman,) No. CV-10-0328-CI
)
Plaintiff,) ORDER GRANTING PLAINTIFF'S
) MOTION AND REMANDING FOR
) ADDITIONAL PROCEEDINGS
) PURSUANT TO 42 U.S.C. §
v.) 405(g)
MICHAEL J. ASTRUE, Commissioner)
of Social Security,)
Defendant.)

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 16.) Attorney Jeffrey Schwab represents Jan M. Freeman (Plaintiff); Special Assistant United States Attorney Richard Rodriguez represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(q).

JURISDICTION

Plaintiff protectively filed for Supplemental Security Income (SSI) on June 13, 2007. (Tr. 21.) He alleged disability due to "rheumatoid arthritis, osteoarthritis, HLA/B27 positive, spondylyoarthropathy, hep C, hypertension, hyperlipidemia, chronic neck pain, GERD" (Tr. 124), with an amended onset date of June 13,

1 2007. (Tr. 182.) After benefits were denied initially and on
 2 reconsideration, Plaintiff requested a hearing before an
 3 administrative law judge (ALJ), which was held in Wenatchee,
 4 Washington on, August 6, 2009. (Tr. 21.) ALJ Louis J. Volz, III,
 5 presided over the hearing via video conference from Metarie,
 6 Louisiana. Plaintiff, who was represented by counsel, and
 7 vocational expert John M. Yent (VE) testified. (Tr. 33-61.) The
 8 ALJ denied benefits on August 31, 2009, and the Appeals Council
 9 denied review. (Tr. 1-4, 21-30.) Plaintiff's claim is before this
 10 court pursuant to 42 U.S.C. § 405(g).

11 **STANDARD OF REVIEW**

12 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 13 court set out the standard of review:

14 A district court's order upholding the Commissioner's
 15 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 16 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 17 Commissioner may be reversed only if it is not supported
 18 by substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
 19 Substantial evidence is defined as being more than a mere
 20 scintilla, but less than a preponderance. *Id.* at 1098.
 21 Put another way, substantial evidence is such relevant
 22 evidence as a reasonable mind might accept as adequate to
 23 support a conclusion. *Richardson v. Perales*, 402 U.S.
 24 389, 401 (1971). If the evidence is susceptible to more
 25 than one rational interpretation, the court may not
 26 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of
 Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

27 The ALJ is responsible for determining credibility,
 28 resolving conflicts in medical testimony, and resolving
 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

27 It is the role of the trier of fact, not this court, to resolve
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1 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
 2 supports more than one rational interpretation, the court may not
 3 substitute its judgment for that of the Commissioner. *Tackett*, 180
 4 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
 5 Nevertheless, a decision supported by substantial evidence will
 6 still be set aside if the proper legal standards were not applied in
 7 weighing the evidence and making the decision. *Brawner v. Secretary*
 8 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
 9 there is substantial evidence to support the administrative
 10 findings, or if there is conflicting evidence that will support a
 11 finding of either disability or non-disability, the finding of the
 12 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
 13 1230 (9th Cir. 1987).

14 **SEQUENTIAL EVALUATION**

15 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 16 requirements necessary to establish disability:

17 Under the Social Security Act, individuals who are
 18 "under a disability" are eligible to receive benefits. 42
 19 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 20 medically determinable physical or mental impairment"
 21 which prevents one from engaging "in any substantial
 22 gainful activity" and is expected to result in death or
 23 last "for a continuous period of not less than 12 months."
 24 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 25 from "anatomical, physiological, or psychological
 26 abnormalities which are demonstrable by medically
 27 acceptable clinical and laboratory diagnostic techniques."
 28 42 U.S.C. § 423(d)(3). The Act also provides that a
 claimant will be eligible for benefits only if his
 impairments "are of such severity that he is not only
 unable to do his previous work but cannot, considering his
 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

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 30 In evaluating whether a claimant suffers from a

disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

7 The Commissioner has established a five-step sequential
8 evaluation process for determining whether a person is disabled. 20
9 C.F.R. §416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42
10 (1987). In steps one through four, the burden of proof rests upon
11 the claimant to establish a *prima facie* case of entitlement to
12 disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
13 1971). This burden is met once a claimant establishes that a
14 physical or mental impairment prevents him from engaging in his
15 previous occupation. 20 C.F.R. §416.920(a). At step five, the
16 burden shifts to the Commissioner to show that (1) the claimant can
17 perform other substantial gainful activity; and (2) a "significant
18 number of jobs exist in the national economy" which claimant can
19 perform. 20 C.F.R. §416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d
20 1496, 1498 (9th Cir. 1984).

STATEMENT OF THE CASE

22 The facts of the case are set forth in detail in the transcript
23 of proceedings and are briefly summarized here. Plaintiff was 47
24 years old at the time of the hearing and had an 10th grade education.
25 (Tr. 44, 55.) He was unmarried and living with his eight year old
26 son in a house. (Tr. 44.) Plaintiff reported a 20-25 year work
27 history as a construction carpenter at the heavy exertional level.

1 (Tr. 126.) He stated he could no longer work due to orthopedic
2 problems that restricted his range of motion and caused severe pain.
3 He testified he had been restricted to lifting no more than five
4 pounds by his treatment provider (Tr. 39), but he thought he could
5 lift and carry about ten pounds close to his body when he was not
6 having back spasms. (Tr. 48.) He also stated he could walk a block
7 or two, sit for ten to fifteen minutes when having back spasms, and
8 stand for about ten minutes. (Tr. 35-36.) He testified he also had
9 constant headaches and frequent neck pain that restricted his range
10 of motion and kept him from participating in most activities. (Tr.
11 49-50.)

12 **ADMINISTRATIVE DECISION**

13 At step one, ALJ Volz found Plaintiff had not engaged in
14 substantial gainful activity since the amended alleged onset date of
15 June 13, 2007. (Tr. 23.) At step two, he found Plaintiff had severe
16 impairments of "degenerative disc disease of the cervical spine;
17 spondylosis of the cervical spine; and degenerative disc disease of
18 the lumbar spine," impairments that the ALJ found subsume
19 Plaintiff's claims of arthritis and spondyloarthropathy. *Id.* The
20 ALJ found the medically determinable mental impairment of depression
21 was non-severe, and evidence suggesting gastroesophageal,
22 hyperlipidemia, and hypertension indicates these conditions are non-
23 severe in that they do not cause significant functional
24 restrictions. (Tr. 23-24.) Regarding claims of hepatitis C and
25 HLA/B27, the ALJ found there was no specific reference to these
26 conditions in the record and no evidence that they cause functional
27 restrictions. (Tr. 24.) At step three, the ALJ found Plaintiff's
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1 impairments, alone and in combination, did not meet or medically
2 equal one of the listed impairments in 20 C.F.R., Appendix 1,
3 Subpart P, Regulations No. 4 (Listings). (Tr. 24.) Specifically,
4 he found Plaintiff did not meet Listings 1.00, 4.00, 5.00 and 12.00.
5 (*Id.*) At step four, he determined Plaintiff had a residual
6 functional capacity to perform unskilled, sedentary work. (Tr. 24-
7 25, 29.) In his discussion of the evidence, ALJ Volz found
8 Plaintiff's subjective symptom testimony was not credible to the
9 extent his alleged limitations were inconsistent with the RFC
10 findings. (Tr. 25-26.) Based on the RFC and VE testimony, the ALJ
11 concluded Plaintiff could no longer perform his past work as a
12 construction carpenter as performed at the heavy exertional level.
13 (Tr. 28.) At step five, the ALJ found there were other unskilled
14 sedentary jobs Plaintiff could perform, such as an order clerk,
15 traffic clerk, and telemarketer. (Tr. 29.) He concluded Plaintiff
16 had not been under a disability as defined by the Social Security
17 Act since the date his SSI application was filed. (*Id.*)

ISSUES

19 The question presented is whether the ALJ's denial of benefits
20 is supported by substantial evidence and free of legal error.
21 Plaintiff argues the ALJ erred at step two and step three. (ECF No.
22 14.) He contends (1) the medical evidence establishing a severe
23 mental impairment of depression triggered the ALJ's duty to order a
24 psychological exam to further develop the record, and (2) the ALJ
25 erred when he did not take medical expert testimony to determine if
26 the medical evidence of severe degeneration of the spine combined
27 with radiculopathy, neuropathy, lateral encroachment of the neural

1 foramina bilaterally, osteophyte formation, and the "high
2 complexity" of his case, in combination, equal Listing 1.04A. (*Id.*
3 at 6-8.) Plaintiff also argues the Commissioner's credibility
4 findings and hypothetical question at step five are not supported by
5 substantial evidence. (*Id.* at 9-10.)

6 DISCUSSION

7 **A. Step Three: Listing Equivalency**

8 The Commissioner has promulgated a "Listing of Impairments"
9 that are "so severe that they are irrebuttably presumed disabling,
10 without any specific finding as to the claimant's ability to perform
11 his past relevant work or any other jobs." *Lester v. Chater*, 81
12 F.3d 821, 828 (9th Cir. 1995). If a claimant's impairment does not
13 meet the criteria specified in the Listings, he or she is still
14 disabled if the impairment equals a listed impairment. 20 C.F.R. §
15 416.920(d). If a claimant has more than one impairment, the
16 Commissioner must determine whether the combination of impairments
17 is medically equal to any listed impairment. 20 C.F.R. §
18 416.926(a). A claimant's symptoms "must be considered in
19 combination and must not be fragmentized in evaluating their
20 effects." *Lester*, 81 F.3d at 829. A finding of medical equivalence
21 must be based on medical evidence from acceptable medical sources
22 only, *i.e.*, licensed psychologists or physicians designated by the
23 Commissioner. 20 C.F.R. §§ 416.929(d)(3), .926 (c),(d).

24 Here, Plaintiff claimed he met or equaled Listing section 1.04A
25 in a pre-hearing questionnaire, sent to him by the agency in June
26 2009. (Tr. 179-82.) Not only did he explain how the elements of
27 the Listing were established by the medical evidence submitted, he
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1 specifically identified objective imaging results to support his
 2 claim. He also identified non-exertional depression and stress as
 3 mental impairments contributing to the severity of his disability.
 4 (*Id.*) At the August 6, 2009, hearing, Plaintiff's representative
 5 again argued the medical evidence established severe cervical and
 6 lumbar spine impairments that either met or equaled Listing 1.04A.
 7 (Tr. 35-36.) In response to Mr. Schwab's argument setting forth his
 8 theory of why Plaintiff's combined impairments met the Listing, ALJ
 9 Volz stated, "Further the equaling Listing of 1.04, sir, I'm sure
 10 you're aware that I cannot determine, as a matter of law, equaling
 11 a listing [in the] absence of a medical expert. There is no medical
 12 expert, so equaling is not before me at present." (Tr. 36-37.)

13 The ALJ thus correctly confirms that "[l]ongstanding policy
 14 requires that the judgment of a physician or psychologist designated
 15 by the Commissioner on the issue of equivalence on the evidence
 16 before the administrative law judge . . . must be received into the
 17 record as expert opinion evidence and given appropriate weight."
 18 *SSR 96-6p*. The Commissioner advises when the evidence suggests a
 19 judgment of equivalence may be reasonable and a medical judgment as
 20 to medical equivalence must be made by the ALJ, a medical expert
 21 must be called. *Id.* Further, where a claimant presents evidence
 22 that a combination of impairments equals a listing, the ALJ must
 23 make findings sufficient to show he actually considered equivalence.
 24 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990).

25 Here, the ALJ's conclusory finding at step three that
 26 "evaluation of the medical evidence does not support that the
 27 claimant meets the criteria set forth by the listings as stated in
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1 20 CFR Part 404, Subpart P, Appendix 1," (Tr. 24), is insufficient
2 to show that he considered Plaintiff's articulated theory of
3 equivalence.

4 Defendant's response that Plaintiff did not meet his burden to
5 present evidence that he has met the "strict demands of the listing
6 requirements" is not persuasive. (ECF No. 17 at 13-14.) While it
7 is true ALJ Volz made brief findings regarding meeting the listing,
8 he made no findings regarding equivalence. Further, the ALJ
9 acknowledged a medical expert was necessary to determine equivalence
10 after Plaintiff articulated, on the record, his basis for a finding
11 of equivalence. The record shows Plaintiff met his step two burden
12 by presenting objective medical evidence of severe spinal
13 impairments and consistently reported limitations that could be
14 caused by Listing level musculoskeletal impairments. Further (as
15 discussed more fully below), the Commissioner's regulations and
16 policy rulings, as well as our case law, are clear that all
17 impairments (including attendant pain and mobility limitations) must
18 be considered together in reviewing the "symptoms, signs, and
19 laboratory findings about [a claimant's] impairments to determine
20 whether the combination of impairments is medically equal to any
21 listed impairment." 20 C.F.R. § 404.1526(b)(3); *Lester v. Chater*,
22 81 F.3d 821, 829, 830 n.6 (9th Cir. 1995); *SSR* 96-6p. Neither the
23 ALJ nor this court possesses the requisite medical expertise to
24 determine if Plaintiff's impairments (including pain) in combination
25 equal one of the Commissioner's Listing.

26 Because the issue of medical equivalence was presented to the
27 ALJ, and the ALJ acknowledged the insufficiency of the record to
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1 make a step three determination of equivalence, but failed to
2 conduct a supplemental hearing with medical expert testimony, or
3 make equivalence findings, the ALJ's step three findings are
4 unsupported by substantial evidence and based on legal error. *Lewis*
5 *v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001). Reversal and remand for
6 medical expert testimony and new step three findings is required.
7 *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005); *Benecke v.*
8 *Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004); *Marcia*, 900 F.2d at 176
9 (equivalence determination requires multiple impairment analysis);
10 *SSR* 96-6p.

11 **B. Step Two - Depression as a Severe Impairment**

12 Plaintiff argues the medical evidence establishes depression is
13 a severe impairment, the effects of which were erroneously
14 disregarded throughout the sequential evaluation. (ECF No. 14.) At
15 step two of the sequential evaluation, the ALJ determines whether a
16 claimant suffers from a "severe" impairment, *i.e.*, one that
17 significantly limits her physical or mental ability to do basic work
18 activities. 20 C.F.R. § 416.920(c). To satisfy step two's
19 requirement of a severe impairment, the claimant must prove the
20 existence of a physical or mental impairment by providing medical
21 evidence consisting of signs, symptoms, and laboratory findings; the
22 claimant's own statement of symptoms alone will not suffice. 20
23 C.F.R. § 416.908. The fact that a medically determinable condition
24 exists does not automatically mean the symptoms are "severe," or
25 "disabling" as defined by the Social Security regulations. See,
e.g., *Edlund*, 253 F.3d at 1159-60; *Fair v. Bowen*, 885 F.2d 597, 603
(9th Cir. 1989); *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir.
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1 1985).

2 As mentioned above, where non-severe impairments exist, the
3 effects of severe and non-severe impairments must be considered
4 together throughout the sequential evaluation process to determine
5 how his impairments in combination affect his ability to work. 20
6 C.F.R. § 416.923. Here, the record shows Plaintiff's treating
7 physician, Jae Park, M.D., diagnosed depression in February 2002.
8 (Tr. 197-98.) As noted also by the treating rheumatologist, Dr.
9 Sager, in February 2002, Plaintiff's degenerative disease and
10 attendant pain and lack of mobility affected his ability to sleep,
11 work, and interact with medical providers. (Tr. 194.) He opined
12 Plaintiff was an "ideal candidate" for the pain clinic and multi-
13 disciplinary therapies. (*Id.*) In August 2008, Plaintiff's treating
14 medical provider assessed depression and started Plaintiff on anti-
15 depressants. (Tr. 261-63.) For step two purposes, Plaintiff met his
16 burden of providing objective medical evidence consisting of signs,
17 symptoms, diagnoses, and medical records documenting treatment with
18 medication during the relevant period. 20 C.F.R. § 416.926; *Webb v*
19 *Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). Even though a finding
20 of severe depression does not necessitate a finding of disability,
21 the ALJ erred in disregarding the effects of depression and pain in
22 his step three, four, and five findings.

23 Plaintiff might not succeed in proving his impairments equal
24 the listing level or that he is unable to perform other work in the
25 national economy. *Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir.
26 2007) (*citing Tackett*, 180 F.3d at 1100). However, it is not
27 conclusive that a reasonable ALJ, considering Plaintiff's physical
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1 and psychological impairments (severe and non-severe) and symptoms,
2 in combination along with medical expert testimony, would find
3 Plaintiff "not disabled." *Stout v. Commissioner, Social Sec.*
4 *Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006). Accordingly,

5 **IT IS ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
7 **GRANTED** and the matter is remanded to the Commissioner for
8 additional proceedings pursuant to 42 U.S.C. § 405(g). On remand,
9 Plaintiff may submit additional records relevant to the period at
10 issue. An ALJ shall conduct a new hearing, obtain medical expert
11 testimony regarding Listing equivalence of Plaintiff's impairments
12 in combination. If Plaintiff does not meet or equal a Listing at
13 step three, the ALJ shall continue the sequential evaluation, make
14 new credibility and RFC findings based on the additional evidence,
15 and make new step five findings based on additional VE testimony and
16 a new hypothetical, if required by the additional evidence.

17 2. Defendant's Motion for Summary Judgment (**ECF No. 16**) is
18 **DENIED**.

19 3. Application for attorney fees may be filed by separate
20 motion.

21 The District Court Executive is directed to file this Order and
22 provide a copy to counsel for Plaintiff and Defendant. Judgment
23 shall be entered for **Plaintiff**, and the file shall be **CLOSED**.

24 DATED February 6, 2012.

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S/ CYNTHIA IMBROGNO
27 UNITED STATES MAGISTRATE JUDGE
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